SHAREHOLDING NOTIFICATIONS BY LISTED COMPANIES AND THEIR SHAREHOLDERS

Listed companies and their shareholders are subject to various notification obligations to the AFM with respect to their shareholdings and voting rights. This article provides an overview of the notification obligations in respect of the listed company's issued share capital, substantial holdings and shareholdings held by managing directors and supervisory directors.

1. INTRODUCTION

Listed companies and their shareholders are required to make certain notifications to the Dutch regulator, *Autoriteit Financiële Markten* (AFM), regarding their shareholdings and voting rights. These notification obligations are based in from Chapter 5.3 of the Financial Supervision Act (*Wet op het financieel toezicht* (Wft)) and are, for the most part, an implementation of the Transparency Directive.[1] The primary purpose of these notifications is to promote transparency with respect to shareholdings and voting rights in listed companies (hereinafter: issuers).

Notifications to the AFM must be made through the online portal 'Loket AFM'.[2] The AFM processes the notifications in registers that can be consulted on its website free of charge. There are various registers, including for issued share capital, for substantial holdings, and for the issuer's managing directors and supervisory directors.[3] The AFM also offers an update service, where one can register to receive updates on any changes to these registers.[4]

This article provides an overview of the notification obligations that follow from Chapter 5.3 of the Wft with respect to issued capital, substantial holdings, and shareholdings held by the issuer's executive directors and supervisory directors. Other disclosure and information obligations of issuers and their shareholders under, for example, Chapter 5.1a Wft, the Market Abuse Regulation and the Short Selling Regulation will not be discussed. The notification obligations in respect of gross short positions are also beyond the scope of this article.

2. TERMINOLOGY

Article 5:33 Wft contains certain definitions that differ from the general definitions in Article 1:1 Wft, applying specifically to the notification obligations pursuant to Chapter 5.3 Wft. The most important definitions for this article are those of issuer (*uitgevende instelling*), share (*aandeel*), and voting rights (*stemmen*). In addition, the term 'without delay' (*onverwijld*) is important.

2.1 Issuer

The AFM notification obligations pursuant to Chapter 5.3 Wft apply with respect to the following issuers (*uitgevende instellingen*):[5]

(i) Dutch public limited companies (NVs) listed on a regulated market.[6] These can be Dutch NVs listed on a regulated market in the Netherlands, such as Euronext Amsterdam, or NVs listed on a regulated market outside the Netherlands, such as Euronext Paris.

(ii) Legal entities with a home member state other than the Netherlands, listed only on a regulated market in the Netherlands and not on another regulated market. An example is a Luxembourg company with Luxembourg as its home member state and listed solely on Euronext Amsterdam. An example of a legal entity *not* covered by this definition is a Belgian NV with Belgium as its home member state, listed not only on Euronext Amsterdam but also on Euronext Brussels, a regulated market in Belgium.

[1] Directive 2004/109/EC.
[2] https://www.loket.afm.nl/loket/en-GB/default2.aspx?
[3] https://www.afm.nl/en/sector/registers/meldingenregisters
[4] https://www.afm.nl/en/sector/registers/afm-update-service
[5] Article 5:33(1)(a) Wft.
[6] The Wft explicitly refers to NVs, which means that listed Dutch BVs do not fall within the scope of these notification obligations. One of the few listed BVs is Fastned B.V. In addition, several SPACs (special purpose acquisition vehicles) have been structured as a BV in recent years. For example, see E.J. Glazener, N.A.M. Offergelt and T. de Jong, "SPACs en de-SPACs," *Tijdschrift voor Jaarrekeningenrecht* 2022, vol. 3, p. 77-84.

(iii) Legal entities from a third country (non-EU member state), regardless of their home member state, listed on a regulated market in the Netherlands. There is no restriction that this must be the only regulated market where the legal entity is listed. An example of this third category is a Swiss AG listed on Euronext Amsterdam.

2.2 Shares and voting rights

For the purposes of the notification obligations, the term 'shares' (*aandelen*) includes, in addition to a share, a depositary receipt for a share, an option, or any other negotiable instrument of value for the purpose of acquiring a share or a depositary receipt. Examples of the latter category include restricted stock units (RSUs), marketable convertible bonds, and warrants.

Voting rights (*stemmen*) are votes that can be cast on shares. The basic principle is that one share entitles the holder to one vote, although there are exceptions to this, for example in the case of shares with multiple voting rights.

In most cases, the notification obligations with respect to shares and voting rights will be the same, unless the attribution rules provide that only one of the two should be notified. When this article refers to holdings of shares that must be notified, this also includes the notification obligation with respect to the voting rights attached to it, unless otherwise indicated.

2.3 Without delay

The majority of the notifications discussed below must be made 'without delay' (*onverwijld*). The Wft does not specify what this means. The AFM provides further guidance in its Guidelines: without delay means that the time between the moment the person with the notification obligation knows or should know that there is a change in their shareholding that triggers a notification and the moment the AFM receives the notification should be as short as possible, given the circumstances.[7]

3. ISSUED SHARE CAPITAL NOTIFICATIONS

An issuer must make a notification to the AFM without delay of any changes in its issued share capital and voting rights. The issued share capital is a monetary amount, calculated as the number of shares multiplied by their nominal value.[8] The total number of voting rights is an absolute number.

This notification obligation covers the entire issued capital, including, if applicable, classes of shares that are not admitted to listing or included in the book-entry systems. For example, an issuer may have preferred shares or priority shares, which are generally not listed, but still count towards the total issued share capital. Shares held by the issuer in its own capital are also included in the issued share capital, and must therefore be included in this notification. It should be noted that, although the issuer cannot exercise voting rights on shares it holds in its own capital, these voting rights do count towards the calculation of the total number of voting rights in the issued share capital notification (see also 'Substantial holdings notifications' below).

Articles 3 and 4 Bmzk[9] prescribe which information must be submitted with the notification. The AFM processes the notifications in the 'Register issued capital'.[10] The issued capital notification is relevant, among other things, for determining the denominator in the calculation when a notification obligation arises for a shareholder (see 'Substantial holdings notifications' below).

A distinction can be made between the initial notification, which must be made when the relevant company becomes an issuer, and the subsequent ongoing occasional and periodic notification obligations.

3.1 Initial notification of issued share capital

A Dutch NV or a company from a third country that becomes an issuer must notify its issued capital to the

[7] AFM Guideline for Shareholders (March 2021), p. 39 and AFM Guideline for Issuing institutions, executive directors and supervisory directors (March 2021), p. 18.

[8] There are foreign companies listed on Euronext Amsterdam that have shares without a nominal value, such as Pershing Square Holdings, Ltd. and CVC Capital Partners plc. Therefore, their registered issued capital in the AFM register is 0. This also means that shareholders can only notify their voting rights and not their shareholding (which is a percentage of the issued capital) in their substantial holdings notifications. Dutch NVs cannot have shares without a nominal value.

[9] Decree on Disclosure of Control and Capital Interests in Issuers Wft (*Besluit melding zeggenschap en kapitaalbelang in uitgevende instellingen Wft* (Bmzk)).

[10] https://www.afm.nl/en/sector/registers/meldingenregisters/geplaatst-kapitaal

AFM without delay.[11] This notification only has to be made once. Per the definition of 'issuer' in Article 5:33 Wft, a company becomes an issuer when its shares are admitted to trading on a regulated market.

3.2 Continuous notification obligations for changes in issued share capital

After the initial notification, an issuer has an ongoing obligation to notify the AFM of changes in its issued capital. This concerns an occasional and a periodic notification obligation.

Any change in its share capital of 1% or more compared to the previous notification must be notified to the AFM without delay.[12] Multiple smaller changes during a calendar quarter should be added together and must be notified once the 1% threshold is reached.

If the voting rights change by 1% or more compared to the previous notification and this change does not result from a notifiable change in share capital, the change in voting rights must be notified on a standalone basis.[13]

Within 8 days of the end of each quarter, the changes during that quarter must be notified in aggregate if they had not already been notified due to the 1% threshold being exceeded.[14]

4. SUBSTANTIAL HOLDINGS NOTIFICATIONS

Holders of shares and other persons entitled to vote in an issuer must make a notification to the AFM of their shareholdings and voting rights once certain percentage thresholds are reached, cross. Articles 5 and 8 Bmzk prescribe which information must be submitted with such substantial holdings notification. The AFM processes these notifications in the 'Register substantial holdings and gross short positions'.[15]

The responsibility for this notification obligation lies with the shareholder subject to notification, and not with the issuer.[16] However, an issuer may also hold shares in its own capital; in which case it must, in its capacity as shareholder, comply with the same rules regarding substantial holdings notifications as other shareholders. [17]

Certain parties are, under conditions, exempt from all or part of the substantial holdings notification obligations. This applies to, among others, clearing houses, national central banks, custodians of shares (if they cannot exercise the voting rights at their own discretion), and certain other financial companies that hold equity interests in connection with their specific activities.[18]

4.1 Initial substantial holdings notification

The first notification obligation for a shareholder with a substantial holding arises when the company becomes an issuer: anyone who has a substantial holding at that time must make a notification to the AFM without delay.[19] A substantial holding means, in this case, at least 3% of the shares or being able to cast at least 3% of the voting rights.[20] In practice, this initial notification by shareholders cannot be made until the issuer has made its initial issued share capital notification to the AFM, because the calculation of the substantial shareholding must be based on the issued share capital of the issuer.

4.2 Notification upon reaching or crossing a threshold

Any person holding a shareholding or voting rights in an issuer must make a notification to the AFM without delay if their shareholding or voting rights, to their

[11] Article 5:36 Wft. It is striking that this initial notification obligation only applies to two of the three subcategories of issuers from Article 5:33 Wft: the obligation does not apply to legal entities with a home member state other than the Netherlands that is only listed on a regulated market in the Netherlands (Article 5:33(1)(a)(2)). It would go beyond the scope of this contribution to explore this in detail, but for further information, see, for example Grundmann-van de Krol, C.M. (2022), *Koersen door de Wet op het financieel toezicht (Deel II – Effectenuitgevende instellingen)*, Den Haag: Boom Juridisch, no. 518.
[12] Article 5:34 Wft.
[13] Article 5:35 Wft.
[14] Articles 5:34(2) and 5:35(2) Wft in conjunction with Article 2 Bmzk.
[15] https://www.afm.nl/en/sector/registers/meldingenregisters/substantiele-deelnemingen
[16] It should be noted that the issuer does have an obligation to notify the AFM without delay if it suspects that an incorrect substantial holdings notification has been made (Article 5:50 Wft).
[17] In that case, the issuer should only notifies its shareholding and no voting rights, because it can not exercise voting rights on its own shares. See also 'Notification upon reaching or crossing a threshold' below.
[18] Article 5:46 Wft. See also Articles 8c and 8d Bmzk.
[19] Article 5:43 Wft. Like the initial notification for issued capital (Article 5:36 Wft), this initial notification obligation applies only to holders of substantial holdings in a Dutch NV or in a third-country company listed on a Dutch regulated market - and not to substantial holdings in a legal entity with a home member state other than the Netherlands that becomes an issuer.
[20] Article 5:33(1)(f) Wft.

knowledge or as should reasonably be known, reach or cross a notification threshold. The notification thresholds in the Netherlands are 3%, 5%, 10%, 15%, 20%, 25%, 30%, 40%, 50%, 60%, 75% and 95%. This is stricter than the notification thresholds in the Transparency Directive: for example, the lowest threshold in the Transparency Directive is 5%, whereas it is 3% in the Netherlands.[21]

For shareholders in issuers with a home member state other than the Netherlands, alternative notification thresholds apply under Article 5:47 Wft: 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 75%. This is because Article 3(2) Transparency Directive requires that a host member state (where the issuer is listed, but which is not the home member state) may not impose obligations that are more stringent than those under the Transparency Directive. The AFM Guideline for Shareholders contains an overview of which types of issuers are subject to Article 5:47 Wft.

The shareholding of a shareholder is calculated as the absolute shareholding and number of voting rights held by the shareholder (the numerator) as a percentage of the total issued share capital and total voting rights in the issuer (the denominator). The percentage of shares is calculated based on the nominal value of the shares. When making a notification through Loket AFM, the shareholder should enter the absolute number of shares and voting rights at his disposal; the system will then automatically calculate the relevant percentage based on the issuer's issued share capital notification.

In a standard situation of ordinary shares with one vote per share held directly by the notifying party, the number of shares and voting rights will, in principle, be equal. However, there are scenarios where the number of shares and voting rights held by a notifying party is not the same. For example, because the shares have no nominal value (see footnote 8), or because there are shares with multiple voting rights. The notifiable number of shares and voting rights will also not be equal for an issuer that holds a notifiable number of shares in its own capital; because an issuer may not vote on its own shares, the issuer should only notify the shares it holds, but not the associated voting rights. In addition, there are various attribution rules in Article 5:45 Wft pursuant to which persons are deemed to hold only the shares but not the associated voting rights, or only the voting rights but not the underlying shares. See 'Attribution rules' below.

Because only changes that cause a notification threshold to be reached or crossed need to be notified, not all changes in shareholdings become visible in the AFM register. For example, when a shareholder increases his shareholding in a listed company from 2% to 7%, he must make a substantial holdings notification to the AFM because his shareholding has crossed two notification thresholds. If he subsequently sells part of his stake and as a result holds 6%, he does not have to make a notification because his stake has not crossed a notification threshold. However, if he sells another part of his shareholding, after which he holds 1%, a notification must be filed again. If he subsequently sells his entire shareholding, he no longer needs to make a notification, as his holding was already below the lowest notification threshold of 3%. This means that the AFM register will continue to show a 1% shareholding, even though this person is no longer a shareholder.

4.3 Timing

The substantial holdings notification must be made without delay once the shareholder knows, or should reasonably know, that their shareholding has reached or crossed a notification threshold. A person is deemed to know that they have reached or crossed a notification threshold no later than two trading days after he has acquired or lost shares.[22] According to the AFM, a person who already holds a significantly large shareholding should also be expected to keep himself informed of their own share transactions and changes in the issuer's share capital, with a view to any potential notification obligations.[23]

Given these deadlines, it is important to determine the moment from which a person is deemed to have possession of the shares or voting rights. The title underlying the acquisition or disposal is not relevant in this context. It also follows from the AFM Guideline for Shareholders that when an acquisition or disposal arises from an agreement, the notification obligation already arises at the moment the obligation is entered into; the timing of the delivery of the ownership of the shares is irrelevant in this case. Furthermore, in the case of an obligation subject to a condition precedent (*opschortende voorwaarde*), the

[21] Article 9(1) Transparency Directive.
[22] Article 5a Bmzk.
[23] AFM Guideline for Shareholders (March 2021), p. 39.

obligation is not deemed to have arisen yet, and the notification obligation only arises once the condition precedent is fulfilled. An agreement under a condition subsequent (*ontbindende voorwaarde*) has already come into effect, and, consequently, so has the notification obligation. [24]

4.4 Attribution rules

A key aspect for the notification obligation for substantial holdings is having shares or voting rights at one's disposal (*beschikken over*). Article 5:45 Wft contains a list of the situations in which a person has, or is deemed to have, shares or voting rights at their disposal. The first two paragraphs of 5:45 Wft address situations where a person actually has shares or voting rights at their disposal: a person has the shares they hold and the votes they can cast at their disposal; and in the case of usufruct or pledge, the person who can actually cast the voting rights is deemed to have those voting rights at their disposal. In both cases, these are shares and/or voting rights held directly by the notifying party.

From the third paragraph onwards, Article 5:45 Wft covers situations in which a person *is deemed to* have shares or voting rights at their disposal. This means that the notifying party does not directly hold the shares or voting rights themselves, but because of an attribution rule, they are deemed to have those shares or voting rights at their disposal – whether or not to the exclusion of the direct holder thereof.

Because of the various attribution rules, a share or voting right may need to be attributed to more than one person – for example if there is a so-called sustained joint voting policy (see 'Sustained joint voting policy' below). This means that notifications of shares and/or voting rights in respect of one issuer in the substantial holdings register could add up to more than 100%.

4.4.1 Controlled company

The most common attribution rule in practice is that a person is deemed to hold the shares and voting rights held by their controlled company and, as result, has the notification obligation to the exclusion of the controlled company itself (Article 5:45(3) Wft). A controlled company is either a subsidiary within the meaning of Book 2 of the Dutch Civil Code, or a company over which a person can exercise predominant control (*overwegende zeggenschap*). Predominant control means, in this context: having more than 50% of the voting rights or being able to exercise another form of decisive control.[25] In the case of shareholders with an elaborate corporate structure, this attribution rule often results in the notifiable shareholding having to be attributed to an entity somewhere 'up the chain' in the corporate structure. The attribution stops at the entity in the shareholder's corporate structure that is not a controlled company of another entity – as such, this entity will have the notification obligation. When a controlled company stops being controlled by another entity, an independent notification obligation in respect of the notifiable shareholding is triggered without delay.[26]

4.4.2 Holding through a third party

A person is deemed have shares and related voting rights held by a third party on their behalf at their disposal (Article 5:45(4) Wft).

4.4.3 Sustained joint voting policy

Where two or more shareholders have committed towards each other to exercise their voting rights in a certain issuer in accordance with a sustained joint voting policy, each shareholder is deemed to also have the voting rights of the other shareholder at its disposal (Article 5:45(5) Wft). There is only a joint voting policy if the parties have committed to each other to vote in a certain way: as long as they remain free to exercise their voting rights as they see fit, no such voting policy is deemed to exist. Such a voting policy is only considered to be 'sustained' when the agreement applies to more than one shareholders meeting. A voting policy can be agreed in writing, but can also follow from the conduct of the parties involved. The AFM Guideline for Shareholders contains a non-exhaustive list of facts and circumstances based on which the AFM may infer that, possibly, there is a sustained joint voting policy. [27]

4.4.4 Temporary and paid transfer of voting rights

When a person has entered into an agreement with a third party for a temporary and paid transfer of voting

[24] AFM Guideline for Shareholders (March 2021), p. 39.
[25] AFM Guideline for Shareholders (March 2021), p. 19.
[26] Article 5:42 Wft. See also Article 7 Bmzk.
[27] AFM Guideline for Shareholders (March 2021), p. 21-22.

rights, both parties are deemed to hold these voting rights and both will have to make a notification. (Article 5:45(6) Wft). An example is a securities lending agreement, where the person lending the voting rights for consideration acquires an actual shareholding, and the voting rights of the person lending the voting rights changes from an actual voting right to a potential voting right (see also 'Holding shares directly and indirectly; actual and potential shareholdings' below). If any of these changes results in reaching or crossing a notification threshold, this triggers a notification obligation. The AFM Guideline for Shareholders contains further explanation of the attribution rules in securities lending.[28]

4.4.5 Fund Manager

The manager of a mutual fund or a fund for collective investment in securities is deemed to have the shares and voting rights held by the depositary of that fund at its disposal (Article 5:45(7) Wft). These are unincorporated funds. Without this specific attribution rule, the notification obligation would fall on the entity that holds legal ownership on behalf of the fund, such as the depositary or, for example, a foundation. However, in a fund structure, it is inherently the manager, rather than the depositary or another legal owner, who can decide on the exercise of voting rights on the shares in an issuer held in the fund.[29]

If the manager in question is a controlled company of another entity (the parent company), in deviation from Article 5:45(3) Wft the shareholding is *not* attributed to the parent company, as long as the manager can cast the notifiable voting rights at its own discretion and independently from the parent company (Article 5:45(11) Wft).[30] This requires, however, that the parent company makes a notification to the AFM without delay confirming that it wishes to use this exemption, including a statement that the relevant controlled company (the manager) can cast the relevant voting rights at its own discretion.[31]

4.4.6 Joint owners in a community

When a shareholding is part of a community, it is attributed to the community's participants in proportion to their entitlement (Article 5:45(8) Wft). A community can, for example, be a partnership or a matrimonial community.

A special category is the general partnership (vof) and limited partnership (cv). According to the AFM Guideline for Shareholders, a vof or cv is considered a controlled company of all partners who are fully liable for the debts of the company – typically these are the managing partners. Therefore, each managing partner is deemed to own the entire shareholding held by the cv or vof. The cv or vof, as a controlled company, has no independent notification obligation. In addition, the AFM notes that the same applies to foreign companies with a regime similar to the vof or cv, such as limited partnerships.[32]

4.4.7 Power of attorney

A person who has received a proxy to exercise voting rights at their own discretion and without instructions from the grantor of the proxy or a third party, is deemed to have those voting rights at their disposal (Article 5:45(9) Wft). If it is a notifiable shareholding, the proxy holder must notify it as an actual (i.e., not potential) voting right. It follows from the AFM Guideline for Shareholders that the person giving the proxy must also make a notification of the actual voting right.[33]

A common situation in which a proxy is granted with respect to voting rights is in the case of depositary receipts for shares. Which party or parties have a notification obligation in such cases, and whether a potential or actual voting right must be notified, depends on factors such as whether the depositary receipts were issued with the cooperation of the issuer or not, whether the depositary receipts are exchangeable, and the conditions under which the depositary receipt holder receives a voting proxy.[34]

[28] AFM Guideline for Shareholders (March 2021), p. 25-26.
[29] See also Grundmann-van de Krol, C.M. (2022), *Koersen door de Wet op het financieel toezicht (Deel II – Effectenuitgevende instellingen)*, Den Haag: Boom Juridisch, no. 527.
[30] See also Article 8b(1) Bmzk.
[31] Article 8b paragraph 2-4 Bmzk. The required form for this purpose can be found at https://www.afm.nl/nl-nl/sector/effectenuitgevende-ondernemingen/meldingen/onafhankelijkheid, and must be submitted via Cryptshare to melden@afm.nl. If it concerns shares and votes in an issuer with a home member state other than the Netherlands, this notification must be made to regulator of the home member state.
[32] AFM Guideline for Shareholders (March 2021), p. 22-23.
[33] AFM Guideline for Shareholders (March 2021), p. 24.
[34] See AFM Guideline for Shareholders (March 2021), p. 24-25. On this subject, see also Parliamentary Papers II 2004/05, 28 985, no. 7, p. 21-22.

4.4.8 Cash-settled instruments

Article 5:45(10) Wft provides that, in certain circumstances, a holder of certain financial instruments other than shares is also deemed to have shares and/or voting rights at its disposal. This applies (i) to instruments whose value increase is partly dependent on the value increase of shares (or related distributions) and the holder has no legal right to acquire a share, (ii) to writing put options with physical delivery, and (iii) to entering into contracts to acquire an economic position comparable to a share. Pursuant to the AFM Guideline for Shareholders, not only instruments that entitle the holder to cash settlement, but also instruments that entitle the holder to physical settlement are covered by the attribution rule of this paragraph 10.[35]

The instruments in the first category are also referred to as cash-settled instruments. Examples include contracts for difference with a settlement other than in shares and (total return) equity swaps. Although these instruments are by their nature in principle settled in cash and do therefore not give a legal right to acquire shares, parties may agree that settlement will occur in shares after all. In the legislative history surrounding the introduction of these attribution rules, it was explained that this could lead to shareholders unexpectedly being confronted with a shareholder who had indirectly built up a substantial shareholding by using cash-settled instruments, without this being subject to a notification obligation. Another reason for the introduction of this attribution rule was said to be that certain cash-settled instruments could be used to influence the exercise of voting rights of the underlying shares.[36]

4.5 Holding shares directly and indirectly; actual and potential shareholdings

A substantial holdings notification must also disclose whether the shareholding is held directly or indirectly, and whether the shareholding is actual or potential.

Holding shares or voting rights *directly* means that a person has the shares they hold themselves and the voting rights they can cast on those shares at their disposal. Holding shares or voting rights *indirectly* means that the shareholding or voting rights are not held by the party with the notification obligation, but their notification obligation stems from the attribution rules pursuant to Article 5:45 Wft (see 'Attribution rules' above).

An *actual* shareholding covers the first two categories of the definition of 'shares' in Article 5:33(1)(b) Wft: shares and depositary receipts for shares. A *potential* shareholding covers the other two categories: options and other negotiable instruments that give the right to acquire a share or a depositary receipt. Generally, the qualification of a voting right as actual or potential will follow the qualification of the underlying share. However, an example where these qualifications are not the same is in case of exchangeable depositary receipts for shares: in that case, in principle an actual shareholding with a potential voting right must be notified.[37] The AFM Guideline for Shareholders contains further information on the notification obligations in respect of different potential shareholdings and voting rights.[38]

It also follows from the AFM Guideline for Shareholders that if a shareholder's interest is composed of both an actual shareholding and a potential shareholding, a change in the division between these two may also trigger a notification obligation.[39] This applies if either the actual shareholding or the potential shareholding (or both) independently reaches or crosses a notification threshold – despite the aggregate shareholding remaining unchanged. For example: if a shareholder's interest is composed of 4% shares and 2% warrants (rights to acquire a share), and those warrants are exercised, the potential shareholding changes from 2% to 0%, and the actual shareholding changes from 4% to 6%. This must then be notified, even though the total shareholding of 6% does not change.

4.6 Substantial holdings notification obligation due to change in issued capital

The most common trigger for a substantial holdings notification is when the shareholding of the notifying party changes as a result of an action taken by the

[35] AFM Guideline for Shareholders (March 2021), p. 29.
[36] Parliamentary Papers II 2010/11, 32 783, no. 3, p. 1/2. See also AFM Guideline for Shareholders (March 2021), p. 28-29
[37] AFM Guideline for Shareholders (March 2021), p. 18.
[38] AFM Guideline for Shareholders (March 2021), p. 16 et seq. See also, for example, Grundmann-van de Krol, C.M. (2022), *Koersen door de Wet op het financieel toezicht (Deel II – Effectenuitgevende instellingen)*, Den Haag: Boom Juridisch, no. 511, for a more detailed explanation of the notification obligations in respect of, among others, put options and call options.
[39] AFM Guideline for Shareholders (March 2021), p. 14.

shareholder: the acquisition or disposal of shares.[40] However, a notification obligation can also arise without any action by the notifying party. If the issued capital in the issuer changes, the denominator changes, and therefore also the percentage held by a shareholder changes. If such a change in issued capital results in the shareholder's interest reaching or crossing a notification threshold, a notification obligation arises for that shareholder. In the case of such a 'passive' trigger, the shareholder is given a bit more time to make the notification: this must be done within four trading days after the change in the issued capital has been published in the AFM register.[41] The AFM update service described above can be used to monitor changes in an issuer's issued capital.

4.7 Special statutory rights

An additional notification obligation exists for acquiring or disposing of one or more shares with a special statutory right.[42] This concerns special voting rights, such as priority shares. Priority shares may, for example, give the holder the right to make a binding nomination for the appointment of managing directors or supervisory directors. Although the holder of such shares with special voting rights may be able to exert significant control in certain situations, the relevant shares will often comprise only a (very) small percentage of the share capital.[43] This notification obligation for such special voting rights seeks to address this issue and ensure such special voting rights are notified as well.

5. NOTIFICATION OBLIGATIONS FOR SHAREHOLDINGS HELD BY DIRECTORS

At the time that a company becomes an issuer, each executive director and supervisory director must make a notification to the AFM of their shareholdings and voting rights in the issuer without delay. If the relevant person does not hold any shares in the issuer at that time, no notification is required. Thereafter, an executive director or supervisory director must notify any change in their shareholding in the issuer to the AFM – this applies regardless of whether a notification threshold is reached or crossed. Newly appointed executive directors and supervisory directors must notify their shareholding in the issuer to the AFM within two weeks of their appointment, and thereafter they must notify any changes.[44] The same attribution rules that apply to substantial holdings notifications also apply to these notification obligations for executive directors and supervisory directors (see 'Attribution rules'). Article 9 Bmzk prescribes which information must be submitted with the notification. The AFM processes the notifications in the 'Register notifications directors and members of the supervisory board'.[45]

These obligations, unlike the other notification obligations, apply only to executive directors and supervisory directors of Dutch NVs whose shares or depositary receipts are admitted to trading on a regulated market.[46] BVs and foreign issuers listed on a Dutch regulated market are therefore exempt from this notification obligation.

When an executive director or supervisory director of an NV ceases to hold office, the issuer must notify this to the AFM without delay, by sending an email to melden@afm.nl.[47] From that moment on, the relevant person no longer has an obligation to make notifications the AFM under Article 5:48 Wft.

5.1 Concurrence with substantial holdings notification

If a shareholding held by an executive director or supervisory director reaches or crosses a notification threshold, this person is also required to make a substantial holdings notification. In that case, the director may suffice with the substantial holdings notification, which is also deemed to fulfil the notification obligation under Article 5:48 Wft.[48] However, in its Guideline for Issuing institutions, executive directors and supervisory directors, the AFM still asks directors to make both notifications, for the sake of transparency: a 5:48 Wft notification for the changed shareholding of the director and a

[40] Article 5:38 Wft.
[41] Article 5:39 Wft.
[42] Articles 5:40 and 5:43 Wft. See Article 6 Bmzk for the information to be provided when making the notification.
[43] Parliamentary Papers II 2002/03, 28 985, no. 3, p. 28.
[44] Article 5:48(3), (4), (6) and (7) Wft.
[45] https://www.afm.nl/en/sector/registers/meldingenregisters/bestuurders-commissarissen
[46] Article 5:48(1) Wft.
[47] Article 5:48(8) Wft. It follows from the legislative history that this 'deregistration' is only required for directors and supervisory directors for whom a notification is included in the register (Parliamentary Papers II 2005-2006, 29 708, no. 19, p. 597).
[48] Article 5:48(6), last sentence, and (7), last sentence, Wft.

substantial holdings notification due to a notification threshold being reached or crossed.[49]

5.2 Concurrence with Article 19 Market Abuse Regulation

Article 19 of the Market Abuse Regulation requires executive directors, supervisory directors and, if applicable, other persons with managerial responsibilities to make a notification of all transactions in shares in the issuer to the competent regulator. For Dutch issuers, this is the AFM. Although this notification obligation is differs slightly from the notification obligation in Article 5:48 Wft, many share transactions by directors will result in a double notification obligation. In order to limit the administrative burden for directors, the AFM has created a temporary solution: in the event of such double notification obligation, only a notification pursuant to Article 5:48 Wft needs to be made, which is deemed to also fulfil the notification obligation under Article 19 Market Abuse Regulation. The AFM has indicated that this is a temporary solution in anticipation of an integrated register where both notifications can be made simultaneously.[50] To date, this integrated register is not yet in place, and it is unclear when it will be introduced.

5.3 Affiliated issuer

The notification obligations for executive directors and supervisory directors described above also apply to shares or voting rights they hold in an affiliated issuer. An affiliated user is another issuer (B) that is affiliated in some way with the issuer (A) of which that person is an executive or supervisory director: either because B is affiliated with A in a group; because A has a shareholding in B and B's sales are at least 10% of A's consolidated sales; or because B provides more than 25% of A's capital.

6. LOKET AFM

Notifications under Chapter 5.3 Wft must be made through the AFM's online portal 'Loket AFM'.[51] In order to make a notification, the party with the notification obligation requires log-in details. These can be requested from the AFM via the website (for persons) or by sending an email to loket@afm.nl (for legal entities). Although the AFM generally responds quickly, it is advisable to request the login details in advance, rather than waiting until the moment when the (initial) notification obligation arises and the notification must be made without delay.

Each party or person with a notification obligation should request its own log-in details. This means that in addition to the issuer, its shareholders, executive directors and supervisory directors must also apply for their own log-in details if they have a notification obligation.

When logging into the Loket AFM for the first time, the notifying party receives a user statement that must be completed, signed, and sent to the AFM. In this statement, the relevant party can, among other things, designate one or more contact persons who will act as administrators for the party's Loket AFM account. The system is set up in such a way that the notifications can already be made in the Loket AFM before the signed user statement has been received by the AFM.

7. ENFORCEMENT

If a party does not comply with a notification obligation, the AFM is authorised to take enforcement action. Among other things, the AFM can impose an administrative fine.[52] Before imposing such a fine, the AFM will generally first issue a warning, typically in the form of a normative letter, or, more strictly, a warning letter.[53] More information about the process for administrative fines can be found on the AFM's website.[54]

The amount of the administrative fines applicable for violation of the notification obligations in Chapter 5.3 Wft is governed by the Financial Sector Administrative Fines Act (*Besluit bestuurlijke boetes financiële sector* (Bbbfs)) and Article 1:81 Wft. For violations of the initial issued capital notification obligation (Article 5:36 Wft), penalty category 3 applies, with a base amount of €2.5 million and a

[49] AFM Guideline for Issuing institutions, executive directors and supervisory directors (March 2021), p. 17.
[50] AFM Guideline for Issuing institutions, executive directors and supervisory directors (March 2021), p. 20/21.
[51] https://www.loket.afm.nl/loket/en-GB/default2.aspx?
[52] Articles 1:25(2) and 1:80 Wft.
[53] See the AFM website for more information on these informal measures (in Dutch): https://www.afm.nl/nl-nl/sector/actueel/2022/december/tb-informele-maatregelen
[54] https://www.afm.nl/en/over-de-afm/maatregelen/bestuurlijke-boete-en-publicatie

maximum amount of €5 million. For violations of the subsequent issued capital notification obligation (Articles 5:34 and 5:35 Wft), penalty category 2 applies, with a base amount of €500,000 and a maximum amount of €1 million. For violations of the notification obligation of executive and supervisory directors of their shareholdings (Article 5:48 Wft), penalty category 2 also applies. For violations of the substantial holdings notification obligation (Articles 5:38 and 5:39 Wft), penalty category 3 applies, albeit with increased amounts: a base amount of €5 million and a maximum amount of €10 million.[55] The AFM can increase or decrease the amount of the fine by 50% compared to the base amount if the seriousness, duration, or culpability of the violation justifies this.[56]

Decisions imposing an administrative fine for violations of a notification obligation are made public by the AFM as soon as possible after imposition. For example, in March 2023, the AFM imposed an administrative fine of €1.7 million on asset manager Janus Henderson for the late notification of its shareholding in Renewi plc.[57] The AFM's fining decision shows that the AFM had warned the fined party multiple times.

Under the Economic Offenses Act (*Wet op de economische delicten* (WED)), the violation of a share notification obligation can also be classified as an economic offense.[58] If the violation is committed intentionally, it qualifies as a felony (*misdrijf*), for which, in principle, a maximum of two years' imprisonment, community service, or a fine of the fourth category (2024: maximum €25,750) can be imposed. If there is no intent, the violation qualifies as a minor offense (*overtreding*), for which, in principle, a maximum of six months' imprisonment, community service, or a fine of the fourth category can be imposed. [59]

8. CONCLUDING REMARKS AND RECOMMENDATIONS

In practice, it can be challenging for issuers and their shareholders to remain consistently alert about when share notifications must be made and what the precise content of such notifications should be. For example, a complex share structure with different classes of shares or the existence of warrants and options may necessitate a thorough analysis to determine if and when a notification obligation arises. Furthermore, due to the various attribution rules it may not be apparent at first glance which party has the notification obligation.

It is therefore advisable for issuers and their shareholders and directors to ascertain with each transaction in shares or other changes in capital, shareholdings or voting rights, whether this triggers a notification obligation, and for whom. Since most notifications must be made without delay, it is prudent to analyse this in a timely manner and seek advice where necessary.

In conducting this analysis, various guidelines published by the AFM can be used, such as the aforementioned AFM Guideline for Issuing institutions, executive directors and supervisory directors, and the AFM Guideline for Shareholders. In addition, the European regulator ESMA has published several Q&As on the Transparency Directive. Ultimately, however, the analysis must be based on the specific circumstances, taking into account all relevant factors, including the share structure, the nature of the change in shareholding, and the parties involved.

[55] Articles 10(4) and table Bbbfs and 1:81(2) Wft.
[56] Articles 2(2) and (3) Bbbfs.
[57] https://www.afm.nl/en/sector/actueel/2023/april/boetebesluit-jhg
[58] Article 1 under 2° WED.
[59] Article 6(1) under 2° (*felony*) and under 5° (*minor offense*) WED.